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Supreme Court, U.S.
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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT S. BASHA AND RAYMOND J. BASHA,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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ISSUES PRESENTED

I. Whether a defendant's rights under the Confrontation Clause of the Sixth Amendment are violated by the admission at trial of written hearsay statements of an unavailable declarant where there is evidence of the declarant's motive to lie.

II. Whether an assumption that the declarant was in fear, or any other purported indicia of reliability, which is derived solely from the substance of a hearsay statement itself can provide a basis for a finding of the existence of particularized guarantees of trustworthiness.

III. Whether a court of appeals, upon determining that the district court erroneously relied on corroborating evidence to determine a hearsay statement to be trustworthy, must remand the case to the district court to permit a determination of trustworthiness without consideration of the corroborating evidence.

PARTIES

United States of America
Anthony Accetturo, Jr.
Raymond J. Basha
Robert S. Basha
Michael V. Monahan

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners, Robert S. Basha and Raymond J. Basha, respectfully request this Honorable Court to grant the petition for writ of certiorari.

Opinions Below

The opinion of the court below is reported at 966 F.2d 631 (11th Cir. 1992), *rehearing denied*, No. 90-3681 (11th Cir. September 25, 1992). The Order of the United States District Court for the Middle District of Florida, Tampa Division (Alaimo, J., presiding), dated April 6, 1990, and granting respondent's motion to admit statements of an unavailable declarant, is attached hereto as Appendix C.

Jurisdiction

The decision of the court below, *United States* v. *Accetturo, et al.*, was entered on July 20, 1992 (Appendix A). Petitioners filed a petition for rehearing and suggestion of rehearing *en banc*, which was denied on September 25, 1992 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The petition is filed within ninety days of the denial of rehearing. Supreme Court Rule 13.4.

Constitutional Provision Involved

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

Statement of the Case

Petitioners were charged with two others on November 15, 1989, in a five count indictment charging them with various offenses relating to an alleged loan to Chris James Loiselle ("Loiselle") in the amount of $40,000 at a usurious rate of interest and alleged attempts to collect the loan when Loiselle failed to pay same by the use of threats of violence and kidnapping.

Petitioners were found guilty of Counts 2 and 3, which charged conspiracy to collect extensions of credit by extortionate means and collecting extensions of credit by extortionate means, in violation of 18 U.S.C. §§ 894 and 2. The remaining counts were the subject of not guilty verdicts or declarations of mistrial and subsequent voluntary dismissal by the government. Robert Basha was sentenced to sixty months imprisonment, with three years supervised release and a $20,000 fine. Raymond Basha received a sentence of fifty

months imprisonment, with three years supervised release and a $20,000 fine. Raymond Basha was released on bond pending appeal.

Loiselle did not appear at trial; he disappeared and was later found murdered.[1] The government moved to admit hearsay statements of Loiselle pursuant to Fed.R.Evid. 804(b)(5). The first of these statements was a four page written statement that Loiselle had given to Detective John Carroll of the Largo Police Department on September 29, 1989, three days after the latest alleged events described in the statement. Detective Carroll did not swear Loiselle as a witness nor was the statement made under the pains and penalty of perjury, but the form on which Loiselle wrote his statement contained an attestation to its truth signed by Loiselle. Detective Carroll testified at trial that he made no independent investigation to verify the veracity of the statement, and did no follow up. He merely watched Loiselle write the statement and then Loiselle left without requesting arrests or protective custody. He did not wish to pursue prosecution.

The statement, in substance, provided:

> Loiselle was the general manager of the Miami branch of First Swiss International Securities Corporation. Because of financial difficulties, Loiselle borrowed money from some accounts to continue operating the office. Unable to return the funds to these accounts, Loiselle contacted Raymond and Robert Basha about a possible loan for this purpose. The loan was made but

[1] Compelling evidence was presented at the hearing on the government's motion to admit Loiselle's hearsay statements that the Bashas had nothing to do with Loiselle's disappearance or death. This evidence consisted of undisputed polygraph results and alibi evidence. Indeed, the trial court ultimately instructed the jury that it could not infer that the defendants had anything to do with Loiselle's death.

> Loiselle was unable to repay it. Without contacting the Bashas, he moved to his mother's house in Tampa.
>
> One Wednesday night in September, at 2:30 a.m., Robert Basha and "Mike" arrived at his house and directed Loiselle to accompany them in their car. Although Loiselle thought they were just going to drive in the neighborhood, they drove him to Hollywood, Florida. He was eventually taken to R & R Jet Tech, a jetski/watersport business owned by the Bashas. Robert and Raymond told him he would have to speak to the person whose money he had borrowed.
>
> About 2:30 p.m. Wednesday, a heavy set short (5'7") guy, wearing a blue cap and large gold necklace, arrived . . . He walked up to Loiselle and smashed him in the face with his hand and told him if he didn't get a hold of the money he would put him in the ground and he would be the last person Loiselle saw.
>
> At the end of the statement, after the signature line, Loiselle wrote that if he was ever missing again, this should explain where or what has happened to him.[2]

At the evidentiary hearing on the government's motion to admit the Loiselle hearsay statements,[3] evidence relating to

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[2] The last two lines of the written statement, *i.e.*, "If I am found missing again, this should explain where or what has happened to me", were not on the copy provided to the defense during the discovery process. The discrepancy was explained by the Government as a photocopying error. The district court overruled defense objections and denied motions to excise these lines, for a mistrial, to reconsider the proposed instructions to the jury advising that Loiselle was dead, and to admit or hold a hearing regarding the Basha's polygraph results. The Court of Appeals upheld the district court on this issue as well. 966 F.2d at 636-37.

[3] The second statement at issue was an oral statement later uttered by Loiselle to a Special Agent of the Florida Department of Law Enforcement during an undercover operation. The Court of Appeals held that this

the untrustworthiness of the statement was also received. The testimony of Jack Malesko, President of First Swiss Securities in New York (Loiselle ran the Miami branch of First Swiss) directly contradicted the background facts in Loiselle's written statement and established that, contrary to his statement, Loiselle had no power to borrow from customer accounts. After the Miami branch was closed, it was discovered that $74,000.00 was missing and Malesko learned that Loiselle had done the same thing to a major brokerage house.

Robert Brindley, an employee of the Miami office of First Swiss and a former friend of Loiselle's (before Loiselle ran up a $12,000.00 debt on Brindley's American Express card and never repaid same) testified that Loiselle deposited customer funds for stock transactions into his own account. Loiselle admitted his wrongdoing to Brindley. Loiselle provided Brindley with a much different version of the alleged kidnapping than Loiselle had reported to the Largo Police. Loiselle wanted to be able to say he was kidnapped so he did not have to repay the money he borrowed from the guys in Miami.

Brindley related a specific instance of Loiselle failing to repay $20,000.00 taken from an elderly customer, Doris Roberts. The Roberts' were so badly damaged that they had to refinance their home.

A transcript of testimony to the SEC regarding Loiselle's unauthorized taking of customer funds was proffered into evidence.

Maureen Cooley testified that Loiselle defrauded her out of $28,000.00 in connection with a hospital project. Six criminal informations charging Loiselle with issuing worthless

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statement escaped similar Confrontation Clause analysis because of its admissibly under F.R.Evid. 803(1). 966 F.2d at 633 n.3.

checks, as well as a certified copy of the judgments of guilt, were also received in evidence at the hearing.

Defense counsel further proffered that Loiselle had not testified before the Grand Jury, that no effort had been made by the government to preserve his testimony and that Loiselle was not called by the government as a witness at the pretrial detention hearing, all to avoid the creation of Jencks material for use in cross-examination of Loiselle.

The district court granted the government's motion, relying primarily on independent corroborating evidence of the statements. The Eleventh Circuit, applying this Court's decision in *Idaho* v. *Wright*, 497 U.S. 805, 110 S.Ct. 3139 (1990), held that the district court had incorrectly relied on independent corroborating evidence in admitting Loiselle's written statement. Nevertheless, without remanding the case and despite recognizing that "there were some indications that Loiselle's statement was not trustworthy", 966 F.2d at 636, the Court of Appeals found that what it described as "compelling evidence of Loiselle's fear" was "sufficient to overcome the presumption against the admissibility of hearsay evidence pursuant to a residual hearsay exception." *Id.*

Reasons For Granting The Writ

THE DECISION BELOW APPROVING THE ADMISSION OF HEARSAY STATEMENTS IN THE ABSENCE OF PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER UNITED STATES COURTS OF APPEALS.

A. *The Confrontation Clause Prohibits The Admission Of Hearsay Statements Of An Unavailable Declarant In The Face Of Evidence Of That Statement's Untrustworthiness.*

In the case at bar, which the court below recognized presented a "question of first impression for [the Eleventh Circuit]", the court identified the principal issue as requiring a determination of "the correct application of *Idaho* v. *Wright* to the determination of the admissibility of hearsay pursuant to a residual hear y exception ..." 966 F.2d at 634. In framing the issue in this manner, the Court of Appeals misconstrued the import of the *Wright* decision, and the analysis of the Eleventh Circuit failed to adhere to the requirements of the Confrontation Clause as defined in *Wright*.

This Court made it clear in *Wright* that, pursuant to the Confrontation Clause of the Sixth Amendment to the United States Constitution, hearsay statements which do not fall within a "firmly rooted hearsay exception" are " 'presumptively unreliable and inadmissible for Confrontation Clause purposes ... and must be excluded, at least absent a showing of particularized guarantees of trustworthiness' ". 110 S.Ct. at 3148, *quoting Lee* v. *Illinois*, 476 U.S. 530, 543 (1986), and *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980). Indeed, those firmly rooted hearsay exceptions which satisfy the Confrontation Clause only do so because they "are so trustworthy that adversarial testing would add little to its reliability." *Idaho* v. *Wright*, 110 S.Ct. at 3149.

In other words, those circumstances where the test of cross-examination is deemed superfluous to the protection of an individual's rights under the Confrontation Clause are rare. This Court has identified the excited utterance, dying declaration and medical treatment exceptions to the hearsay rule as providing sufficient assurances of trustworthiness. This is because these exceptions require the statement to be made under circumstances that virtually "eliminate the possibility of fabrication." *Id.* at 3149, 3152. There clearly must be a "special reason for supposing that the incriminating statements were particularly trustworthy", *Id.* at 3152, or "such trustworthiness that 'there is no material departure from the reason of the general rule' " which recognizes the inherent unreliability of hearsay statements. *Id.* at 3150, *quoting Ohio* v. *Roberts*, 448 U.S. at 65.

While this Court has also held that it would not "endorse a mechanical test for determining 'particularized guarantees of trustworthiness' ", there must at least be a finding that "the test of cross-examination would be of marginal utility" if admission of the statement is to avoid violating the Confrontation Clause. *Idaho* v. *Wright*, 110 S.Ct. at 3149, 3150; *see also*, *Government of the Virgin Islands* v. *Joseph*, 964 F.2d 1380, 1388 (3rd Cir. 1992).

In the absence of a "mechanical test", it is submitted that the lower courts have reached conflicting results in similar cases in which this issue is present, and those results often lose sight of the underlying rationale of the *Wright* decision. *Compare United States* v. *George*, 960 F.2d 97, 100 (9th Cir. 1992) (trustworthiness guaranteed by fact that child referred to days of week as would a child of that age), *with Ring* v. *Erickson*, 968 F.2d 760, 763 (8th Cir. 1992) (pursuant to *Wright*, use of terminology typical of child the age of declarant not a useful factor in determining trustworthiness).

It is respectfully submitted, however, that no decision has departed as far from the reasoning of *Wright* as the opinion of the Eleventh Circuit in the case at bar. To find, as did the court below, that there existed sufficient guarantees of trustworthiness to overcome the presumption of unreliability of the Loiselle statement, required the court to ignore a record which established the contrary, to make assumptions not based on fact, and to effectively shift the government's burden of showing trustworthiness to the defendants to establish unreliability.

It is important to note that the district court in admitting the statement relied primarily on what it described as "substantial circumstantial evidence corroborat[ing] Loiselle's statement." (Appendix C, at A-18). Although the Court of Appeals stated that, in light of *Wright*, it was not considering the purported corroborating evidence, 966 F.2d at 634, it only cited four unpersuasive indicia of reliability that were also found to exist by the district court judge, *i.e.:* (1) because Loiselle was the alleged victim, he would have had the opportunity to witness the events described in his statement firsthand; (2) the written statement described events allegedly occurring only two days before; (3) although not signed under the pains and penalty of perjury, the statement purports to be under oath; and (4) the statement was provided to a law enforcement officer whom the victim would know, both courts presumed, would conduct an investigation to ascertain the truth of the statement. See Appendix C, at A-21, and 966 F.2d at 635.

The "most important" indicia relied upon by the Court of Appeals, *i.e.*, "the compelling evidence of Loiselle's fear", 966 F.2d at 635, 636, received not even an off-handed reference by the district court. Nor should it have. There was no independent evidence of any fear experienced by Loiselle at

the time he wrote the statement[4], nor did the court below identify any such evidence. Indeed, the record reflects exactly the opposite; Loiselle neither sought protection or prosecution of his alleged assailants at the time he gave Detective Carroll the written statement. Moreover, it is entirely more plausible that one would not go voluntarily to the police if he were truly in fear.

The other "guarantees of trustworthiness" noted by the district court and Court of Appeals below are, in fact, either dependent on the truth of the statement itself (an obvious unacceptable boot-strap) or equally capable of being interpreted as an indicia of unreliability. For example, this is not a case where the declarant had any reason to believe that making a false statement would have had any negative legal consequences for him. *Compare, e.g., United States* v. *Ellis*, 951 F.2d 580, 583 (4th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 3030 (1992) (statement made in accordance with plea agreement requiring truthfulness and in the presence of two government agents and both of declarant's attorneys). Nor is this a case where the statement can be compared to others by the declarant to find consistency. *Compare, Dana* v. *Department of Corrections*, 958 F.2d 237, 239 (8th 22Cir. 1992), *cert. denied*, ____ U.S. ____, 112 S.Ct. 3043 (1992); *McCafferty* v. *Leapley*, 944 F.2d 445, 451-52 (8th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 1277 (1992) (statement was consistent with prior statements and no motive to lie present).

Rather, the only *evidence* relating to fear, motive or prior statements in this case mandates an entirely different result. Robert Brindley, Loiselle's co-worker and friend, clearly stated that Loiselle developed a false scenario to extricate himself from the burden of the Basha loan. Other evidence showed Loiselle to be an entirely untrustworthy and decep-

[4] The anomaly of relying on the truth of the statement itself to assume the declarant was in fear is discussed in Argument B, *infra*.

tive individual. Thus, to find that Loiselle had no motive to lie and was in fear, as did the court below, defies the record and logic. The inescapable conclusion that Loiselle's act of making the statement was a calculated fraud is further supported by the fact that Loiselle neither sought nor obtained police protection and the ultimate investigation of the defendants was initiated by law enforcement agents weeks later and not at the behest of Loiselle. As the Court of Appeals for the Sixth Circuit stated in *Sherley* v. *Seabold*, 929 F.2d 272, 275 (6th Cir. 1991), "[b]oth *Wright* and *Roberts* require more than part-time 'reliablity' ".

The court below recognized that its decision conflicted with *United States* v. *Gomez-Lemos*, 939 F.2d 326 (6th Cir. 1991), a case in which grand jury testimony of unavailable co-conspirators, even though given pursuant to a plea agreement, was held inadmissible under *Wright*. 966 F.2d at 635. Surely, inculpatory statements are inherently more reliable than those of the type present in the case at bar. *See, e.g., United States* v. *York*, 933 F.2d 1343, 1364 (7th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 321 (1991). The *Gomez-Lemos* court recognized the incentive the government has to avoid confrontation and cross-examination of its witnesses, stating "that live confrontation and cross-examination of witnesses in the courtroom is the key to finding the truth in a criminal trial — a norm of judicial behavior that will be disregarded only for the most compelling reasons." 939 F.2d at 333-34 (footnotes omitted). In the case at bar, it is beyond dispute that there was an abundance of fertile ground for the cross-examination of Loiselle. Moreover, it was argued in the district court that the government carefully avoided the creation of Jencks material relating to Loiselle (he did not testify at either the detention hearing or before the Grand Jury), apparently recognizing what a weak and deceptive witness it had on its hands.

While several courts analyzing the issue presented here have

resorted to a harmless error analysis even after finding a hearsay statement to be inadmissible, *see, e.g., United States* v. *Balfany*, 965 F.2d 575, 582-83 (8th Cir. 1992), the court below did not reach that question in the case at bar. It is respectfully submitted, however, that the error present here could never be viewed as harmless because, if for no other reason (and there are many other reasons), the last two lines of the statement were so highly prejudicial in their implication that petitioners were responsible for Loiselle's ultimate demise.

B. *Hearsay Statements Cannot Be Admitted Where The Only Guarantees Of Trustworthiness Are Based On Inferences Which Require An Assumption Of The Truth Of The Statement Itself.*

This Court rejected the use of corroborating evidence as support for a hearsay statement's trustworthiness because to use such evidence "would permit admission of a presumptively unreliable statement by boot-strapping on the trustworthiness of other evidence at trial. . . ." *Idaho* v. *Wright*, 110 S.Ct. at 3150. To find the particularized guarantees of trustworthiness in inferences drawn from the hearsay statement itself which require an assumption that the statement is true is an even more egregious boot-strap.

Yet, that is exactly what the Eleventh Circuit has done in the instant case when it found the most compelling indicia of reliability to be Loiselle's alleged fear at the time he made the statement. As previously discussed, the extrinsic evidence supported only one conclusion; Loiselle was not in fear when he gave a written statement to Detective Carroll. Thus, the Court of Appeals must have inferred the presence of fear based upon the substance of Loiselle's statement itself. Needless to say, this type of analysis could be employed in virtually every case to reach a similar conclusion, but the net result would

be to emasculate the constitutional protections described in *Wright*. *See United States* v. *Balfany*, 965 F.2d at 582 (even actual evidence of the declarant being "very disturbed" was not enough to render statement trustworthy). Petitioners have found no other post-*Wright* decision which uses the notion of fear derived from the content of the subject statement itself as an indicia of reliability.

The court below's erroneous analysis was aggravated by another assumption based on the content of the statement but contradicted by other evidence, *i.e.*, that Loiselle had no motive to lie. In effect, the Eleventh Circuit is attempting to carve out a rule that a statement by an alleged victim identifying his alleged assailant inherently has the same guarantees of trustworthiness as more firmly rooted hearsay exceptions. Of course, if that were so, the child declarant's statement in *Wright* would have been admissible even in the face of the challenge under the Confrontation Clause. *Wright* teaches that the constitutional right to cross-examination is far more meaningful.

C. *Where The Appellate Court Finds That The District Court Erroneously Relies On Corroborating Evidence To Determine A Hearsay Statement To Be Trustworthy, The Case Should Be Remanded To The District Court To Permit A Determination Of Trustworthiness Without Consideration Of The Corroborating Evidence.*

In *Government of the Virgin Islands* v. *Joseph*, 964 F.2d at 1388, the Third Circuit recognized that remand would be required where admission of a hearsay statement is sought on grounds "not fully explored by the district court." That remedy is particularly compelling in the case at bar where not only was the Court of Appeals required to reject the principal reason the district court admitted Loiselle's statement (cor-

roborating evidence), but also where the Eleventh Circuit determined the primary guarantee of trustworthiness to be a factor not even considered by the district court (fear).

Clearly, the district court is in a far better position to adjudicate the trustworthiness of the statement under the *Wright* guidelines. Considerable evidence was received relevant to that issue in the district court and that court had the opportunity to observe the demeanor of witnesses and assess their credibility. Given the district court's recognition of the presence of indicia of the *untrustworthiness* and *unreliability* of Loiselle's statement to the Largo Police Department, which was only overcome by virtue of alleged "substantial corroborating evidence," Appendix C, at A-20n.8—A-22, it can hardly be said that Judge Alaimo would have found the statement to survive scrutiny under the Confrontation Clause if he had not relied on independent corroborating evidence.

Conclusion

Based on the foregoing arguments and authorities, this Honorable Court is respectfully urged to grant petitioners a writ of certiorari. Although this Court has declined to review numerous post-*Wright* decisions, it is submitted that none have departed nearly as far from the holding and rationale of *Wright* as the opinion below. Moreover, a review of the numerous cases attempting to apply *Wright* reveals that a body of decisional authority is developing that is irreconcilable and inconsistent with the principles of the Confrontation Clause.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

ANTHONY ACCETTURO, ROBERT S. BASHA,
RAYMOND J. BASHA, MICHAEL V. MONAHAN,
DEFENDANTS-APPELLANTS.

No. 90-3681.

United States Court of Appeals,
Eleventh Circuit.

July 20, 1992.

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F. Lee Bailey, Paul M. Rashkind, Bailey, Gerstein, Carhart, Rashkind, Dresnick & Rippingille, Miami, Fla., for Robert S. Basha and Raymond J. Basha.

Daniel M. Hernandez, Tampa, Fla., for Michael V. Monahan.

Frank J. Marine, Civil Div. Litigation Unit, U.S. Dept. of Justice, Organized Crime, Maria Cassalia Kersten, Washington, D.C., for U.S.

Appeals from the United States District Court for the Middle District of Florida.

Before ANDERSON, Circuit Judge, HILL, Senior Circuit Judge, and YOUNG,* Senior District Judge.

* Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

ANDERSON, Circuit Judge:

Appellants, Anthony Accetturo, Jr., Robert Basha, Raymond Basha, and Michael Monahan, were convicted of conspiracy to collect extensions of credit by extortionate means and collecting extensions of credit by extortionate means, in violation of 18 U.S.C. §§ 894 and 2. For the reasons that follow, we affirm their convictions.

I. BACKGROUND

A. *The Relevant Facts*

Government witnesses testified that on August 11, 1989, Chris Loiselle signed an agreement with Robert and Raymond Basha, in which he borrowed $40,000 for 45 days, agreeing to repay $60,000. Loiselle left town without repaying the loan. In late September 1989, Robert Basha called Kelly Wade, Loiselle's secretary, to inquire into his whereabouts. Robert had discovered a note on Loiselle's door to "Scott," stating that Loiselle had gone to "the Keys." Wade told Robert that the only Scott she knew was Scott Stockholm.

On September 26, 1989, Robert Basha and Michael Monahan went to Stockholm's apartment in Hollywood, Florida to ask about Loiselle. After Monahan began hitting Stockholm, Stockholm told them that he knew where Loiselle was. Stockholm telephoned Loiselle and talked to him briefly. Robert called an individual named "Zap," who came over and insisted that Stockholm take them to Loiselle. Stockholm drove with Robert and Monahan to Loiselle's mother's home in Largo, Florida. Stockholm knocked on the door; when Loiselle answered, Stockholm told him that two men wanted to see him. Robert and Monahan forced Stockholm and Loiselle to accompany them back to Fort Lauderdale. In the car, Monahan berated Loiselle for leaving town without noti-

fying them. The men returned Stockholm to his apartment and left with Loiselle.

On September 29, 1989, Loiselle gave a statement to Detective John L. Carroll of the Largo Police Department. We summarize Loiselle's statement as follows. Loiselle's business had been having financial problems; he had borrowed money to keep the office running. He met with Robert and Raymond Basha, who agreed to lend him $40,000 for 45 days. After Loiselle's company's financial situation worsened, he moved to his mother's house in Largo, Florida without contacting the Bashas. At about 8:30 p.m. on Tuesday evening, he received a brief telephone call from Scott Stockholm. Loiselle later tried to call Stockholm back but was unable to reach him. About 2:30 a.m., he was awakened by Stockholm's knock on the door. Robert Basha and Monahan took Loiselle and Stockholm in the car to Hollywood, Florida, where they dropped Stockholm off. Robert and Monahan drove Loiselle to Monahan's apartment, and then had Robert's girlfriend drive him to R & R Jet Tech (the Bashas' business). After Loiselle explained the circumstances of his leaving town to the Bashas, they told him that he would have to answer to the people who gave them the money. A heavy-set, short man with a blue cap and large gold necklace smashed Loiselle's face with his hand, and said that he would put Loiselle in the ground if Loiselle did not "get ahold of" the money. The man, who Loiselle thought was named Eddy, said that if he had to see Loiselle again he would put him in the ground, and that he would be the last person Loiselle saw. Loiselle's statement ended with the words, "If I am missing again, this should explain where or what has happened to me."

Loiselle agreed to cooperate with the police. Subsequently, several of his conversations with the Bashas were recorded. Undercover agents posed as mobsters who had agreed to pay off Loiselle's loan. The agents met with Robert Basha at the

St. Petersburg-Clearwater airport, and asked to meet the person whose money had been loaned to Loiselle. At approximately 10:30 that evening, Loiselle, Agent Sanz, and Agent Caso observed appellants' aircraft land, taxi, and come to a stop. They observed at least three persons disembark from the aircraft. Pointing to appellant Accetturo, Loiselle stated to Agent Sanz, "That's Tony." Agent Sanz asked, "Is that Tony?" Loiselle replied, "Yes." Agent Sanz then inquired, "Are you sure?" and Loiselle replied, "Yes." Agent Sanz then asked him if that was the one that slapped him, and Loiselle replied, "Yes."

Accetturo, who was accompanied by Robert and Raymond Basha, told the agents that the money that Loiselle had borrowed was his money. The agents negotiated a price of $55,000 for the loan with Accetturo and the Bashas. The three were then arrested.

B. *Proceedings Below*

On November 15, 1989, the grand jury returned a five-count indictment charging appellants as follows: Count 1, conspiracy to participate in the affairs of an enterprise through collection of an unlawful debt, in violation of 18 U.S.C. § 1962(d), with a forfeiture claim against the Bashas and R & R Jet Tech, pursuant to 18 U.S.C. § 1963(a)(2)(D); Count 2, conspiracy to collect extensions of credit by extortionate means, in violation of 18 U.S.C. § 894; Count 3, collecting extensions of credit by extortionate means, in violation of 18 U.S.C. §§ 894 and 2; Count 4, violent crimes in aid of racketeering, in violation of 18 U.S.C. §§ 1959 and 2; and Count 5, violent crimes in aid of racketeering, in violation of 18 U.S.C. §§ 1959 and 2.

Two days before the jury trial was to begin, Loiselle disappeared.[1] The government filed a Motion to Admit Evidence

[1] Loiselle was found murdered five days later.

Pursuant to Rule 804(b)(5) of the Federal Rules of Evidence, seeking to admit into evidence Loiselle's written statement and the oral identification of Accetturo he had given to Agent Sanz at the airport. After an evidentiary hearing, the district court granted the government's motion. At trial, the statements were admitted over appellants' objection. Appellants were each convicted on Counts 2 and 3 of the indictment.[2] This appeal followed.

II. DISCUSSION

A. *The Confrontation Clause Claim*

Appellants argue that the district court abused its discretion and violated the Confrontation Clause by admitting Loiselle's written statement to the police pursuant to Fed.R.Evid. 804 (b)(5), a residual hearsay exception.[3] They claim that under *Idaho* v. *Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990),[4] it was error for the court to consider independent corroborating evidence which tended to prove that Loiselle's statement was true. They argue that the only corroborating evidence which could be considered were circumstances surrounding the making of the statement that rendered the declarant particularly worthy of belief, and that these indicia of reliability were insufficient to justify admitting the statement.

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[2] Accetturo and Raymond Basha were acquitted of Count 4; a mistrial was declared on Counts 1 and 5 as to each defendant, and on Count 4 as to Robert Basha and Monahan. The government dismissed the counts that had resulted in mistrial.

[3] The district court held that Loiselle's oral statement was admissible pursuant to both Fed.R.Evid. 804(b)(5) and 803(1). We find that the court did not abuse its discretion in admitting the oral statement pursuant to 803(1). Because the oral statement was properly admitted under 803(1), we do not discuss its admissibility under 804(b)(5). The text of this opinion, therefore, focuses only on Loiselle's written statement to the police.

[4] *Idaho* v. *Wright* was decided two months after appellants' trial ended.

In *Idaho* v. *Wright*, the Supreme Court considered whether a state trial court's decision to admit hearsay into evidence violated the defendant's rights under the Confrontation Clause of the Sixth Amendment. In that case, a two and a half year old child had made statements regarding sexual abuse to a pediatrician. The trial court decided that the child was not able to communicate with the jury, and allowed the doctor to testify about what she had told him. The court admitted the statements under Idaho's residual hearsay exception, which tracks Fed.R.Evid. 803(24).[5]

In affirming the Idaho Supreme Court's reversal of the conviction, the Court held that the Confrontation Clause requires that once a witness is shown to be unavailable,[6] "his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* at ____, 110 S.Ct. at 3146, *quoting Ohio* v. *Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980). Because Idaho's residual hearsay exception is not "firmly rooted," the Court examined the "trustworthiness" requirement. The Court held that a finding of trustworthiness must be based on a consideration of the totality of the circumstances, but that "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.* 497 U.S. at

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[5] Under Fed.R.Evid. 803, the availability of the declarant is immaterial. Under Fed.R.Evid. 804, the declarant must be unavailable. Otherwise, Fed.R.Evid. 803(24) and 804 (b)(5) are identical.

[6] In *White* v. *Illinois*, ____ U.S. ____, 112 S.Ct. 736, 117 L.Ed.2d 848 (1992), the Supreme Court held that the Confrontation Clause does not require that the declarant be unavailable, at least when the hearsay is admitted under the "spontaneous declaration" or "medical examination" exceptions to the hearsay rule. The *White* decision does not affect *Idaho* v. *Wright's* applicability to this case; Loiselle's unavailability is not at issue.

____, 110 S.Ct. at 3148. The standard is whether "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." *Id.* at ____, 110 S.Ct. at 3149. Thus, the Court held that a trial court may not consider independent corroborating evidence in judging the admissibility of a hearsay statement sought to be admitted pursuant to a residual hearsay exception. *Id.* at ____, 110 S.Ct. at 3050-51.

[1] At the pretrial evidentiary hearing, the district court relied on independent corroborating evidence in deciding to admit Loiselle's statement. The Supreme Court has now stated unequivocally that independent corroborating evidence may not be used to evaluate the admissibility of hearsay evidence which the government seeks to have admitted pursuant to a residual hearsay exception. Thus, we must decide whether, if the corroborating evidence is not considered, there were adequate guarantees of trustworthiness to justify admitting Loiselle's statement under Fed.R.Evid. 804(b)(5).

The correct application of *Idaho* v. *Wright* to the determination of the admissibility of hearsay pursuant to a residual hearsay exception is a question of first impression in this circuit. Accordingly, we look to the circuits that have addressed the issue for guidance. In *United States* v. *Ellis*, 951 F.2d 580 (4th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 3030, ____ L.Ed.2d ____ (1992), the Fourth Circuit held that the hearsay statements of a deceased witness were admissible. The witness, Samuel D'Annunzio, was a West Virginia lobbyist who had assisted the defendant, William Ellis, in his efforts to assure passage of a bill in the state legislature through illegal means. D'Annunzio, who had entered into a plea agreement with the federal government, cooperated with government agents, describing the methods used to further the illegal scheme and secretly recording conversations with Ellis and other participants. During the investigation, D'Annunzio committed suicide.

Ellis's trial took place shortly before *Idaho* v. *Wright* was decided; the district court relied on the kind of independent corroborating evidence that *Wright* later held to be irrelevant. In affirming the conviction, the *Ellis* court found several circumstances surrounding the giving of the statements that made them particularly worthy of belief. D'Annunzio issued the statements voluntarily, in the presence of both police officers and his attorneys. The statements were made in accordance with a plea agreement which required him to be truthful with federal investigators. The government agents took notes as D'Annunzio spoke. D'Annunzio knew that his statements would be investigated further. Finally, D'Annunzio agreed to record conversations with those he had implicated, suggesting that he was willing to have the truthfulness of his statements tested. *Id.* at 583. *But see United States* v. *Gomez-Lemos*, 939 F.2d 326 (6th Cir. 1991) (grand jury testimony of unavailable co-conspirator, given in accordance with plea agreement, held inadmissible under *Idaho* v. *Wright*).

[2] In this case the indicia of reliability are considerably stronger than in the *Ellis* case.[7] Loiselle's statement was writ-

[7] The indicia of reliability in this case are also as strong or stronger than in other cases which have affirmed convictions under *Idaho* v. *Wright*. *See McCafferty* v. *Leapley*, 944 F.2d 445 (8th Cir. 1991) (statements of child sexual abuse victim admitted; statements were explicit, consistent, uncharacteristic for child of victim's age and level of development, recorded, spontaneous or in response to nonleading questions, and victim had no motive to lie), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1277, 117 L.Ed.2d 503 (1992); *United States* v. *Ellis*, 935 F.2d 385 (1st Cir.) (testimony regarding child sexual abuse victim's gestures using anatomically correct dolls admitted; social worker asked virtually no questions but merely gave child the dolls to play with), *cert. denied*, ___ U.S. ___, 112 S.Ct. 201, 116 L.Ed.2d 160 (1991). The evidence of reliability in this case is much stronger than in *United States* v. *Gomez-Lemos*, 939 F.2d 326 (6th Cir. 1991), in which the court applied *Idaho* v. *Wright* and held a co-conspirator's hearsay statement inadmissible. Unlike *Gomez-Lemos*, this case did not involve the statement of a co-conspirator, who would have a motive to implicate others in hopes of exonerating himself or receiving more favor-

ten in his own handwriting, on a form which attested to its truth.[8] Loiselle made the statement voluntarily, after voluntarily coming to the police station in response to a call from the Largo Police Department. The statement was given to law enforcement authorities, who Loiselle knew would most likely investigate further. Like D'Annunzio, Loiselle agreed to record his conversations with the men he had implicated, further indicating that Loiselle knew that the veracity of his story would be tested. The statement's narrative form indicates that Loiselle was not responding to leading questions or undue police influence. Because Loiselle was the victim of the crimes he described, he had ample opportunity to witness first-hand the events in his statement; because only two days had passed they were fresh in his mind. Most important, there was very strong evidence that Loiselle feared for his life; he would have had no incentive to manufacture a statement that would cause an investigation and alert the defendants that he had gone to the police.[9]

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able treatment from the government. *See also Sherley* v. *Seabold*, 929 F.2d 272 (6th Cir. 1991) (statement of 82-year-old victimn, who suffered from memory loss before being robbed and beaten, and whose condition was so much worsened after the attack that she had to be placed in a nursing home, held inadmissible).

[8] The form contained the following language:

> "Before me personally appeared *Chris Loiselle*, who being duly sworn, attests to the truth of his/her statements.
>
> Sworn to and subscribed before me this 29 day of *Sept*, A.D. 1989. *John Carroll*
>
> Taken in my capacity as a law enforcement officer as defined in 943.10 F.S. with *Largo* Police Department and on authority of 925.095 F.S."
>
> Detective John Carroll of the Largo Police Department filled in the blanks and signed the form.

[9] Cases from other circuits indicate that the lack of a motive to lie and the absence of leading questions are important factors to consider. *See, e.g.*, *United States* v. *George*, 960 F.2d 97 (9th Cir. 1992); *Dana* v. *Department of Corrections*, 958 F.2d 237 (8th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3043, ___ L.Ed.2d ___ (May 8, 1992); *McCafferty* v. *Leapley*,

There was also some contrary evidence; there were some indications that Loiselle's statement was not trustworthy. Several witnesses testified that Loiselle had a poor reputation for truthfulness; he had also engaged in fraudulent financial transactions in the past. Robert Brindley, a former friend of Loiselle's, provided some evidence of a motive to fabricate the kidnapping story: to relieve Loiselle of his obligation to repay the usurious loan. Finally, Loiselle's business financial problems could have provided a motive to defraud his creditors.

After carefully weighing the relevant circumstances surrounding the making of Loiselle's statement, we conclude that the indicia of reliability are strong enough to overcome the presumption against the admissibility of hearsay evidence pursuant to a residual hearsay exception. In particular, we are influenced by the compelling evidence of Loiselle's fear. In light of that evidence, we conclude that it is highly unlikely that Loiselle would have told the police that he had been kidnapped, thereby incurring the risk of the defendants' wrath, unless it were true. Loiselle had to know that the inevitable investigation of his kidnapping story would alert the defendants to the fact that Loiselle had informed on them. We conclude that the evidence that Loiselle had no motive to fabricate the story overwhelms the weak evidence of a motive to fabricate.

For the foregoing reasons, we conclude that the district court committed no error in admitting Loiselle's written statement.

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944 F.2d 445 (8th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1277, 117 L.Ed.2d 503 (1992); *United States* v. *Ellis*, 935 F.2d 385 (1st Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 201, 116 L.Ed.2d 160 (1991).

B. *The Government's Failure to Disclose Loiselle's Entire Statement*

[3] After Loiselle's statement was read into evidence, appellants realized that their copies did not contain the last two lines: "If I am found missing again, this should explain where or what has happened to me." Appellants objected and moved for a mistrial or other corrective measures.[10] The district court instructed the jury that the last two lines were to be considered only as they related to Loiselle's state of mind — his belief that failure to repay the loan would result in violence or danger to him. Also, the prosecutor was not allowed to argue about Loiselle's death in summation.

[4, 5] Fed.R.Crim.P. 16 provides in pertinent part:

> (a)(1)(C) Documents and Tangible Objects.
>
> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, . . . which are within the possession, custody, or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial. . . .

Even if inadvertent,[11] the government's failure to provide appellants with Loiselle's entire written statement violated Rule 16. However, a discovery violation does not automatically preclude the government's use of the evidence at trial.

[10] Appellants suggested that the judge reconsider his decision to instruct the jury that Loiselle was dead, excise the last two lines from the statement, not send the statement back with the jury during deliberations, or admit polygraph evidence tending to show that the Bashas were not responsible for Loiselle's death. All of these motions were denied.

[11] There is no evidence that the government's failure to provide appellants with the last two lines of the statement was intentional.

United States v. *Rodriguez*, 799 F.2d 649, 652 (11th Cir. 1986). Relief for violations of discovery rules lies within the discretion of the trial court; a defendant must show prejudice to substantial rights to warrant reversal of that discretion. *Id.* In this case, the appellants have made no showing of prejudice; they have not suggested how they could have rebutted the evidence more effectively had they known about it sooner.

We conclude that the measures taken by the district court were adequate to protect the appellants' rights. The court limited the jury's consideration of the omitted lines to proof of Loiselle's state of mind; the prosecution was not allowed to argue that Loiselle was dead in closing argument, or to suggest any inferences to be drawn from his death. These safeguards were sufficient.[12]

C. *The District Court's Jury Instruction That Loiselle Was Dead*

[6] Appellants contend that the district court erred when it informed the jury that Loiselle was dead, because the instruction's relevance was substantially outweighed by unfair prejudice to the appellants. We disagree. The district court advised the jury that "no inference whatsoever shall be drawn by you, adverse to either side in this case because of his death." The fact that Loiselle had died was relevant to explain the fact that Loiselle did not testify. Had the jury not been told, they might well have incorrectly concluded that Loiselle was incarcerated or was afraid to testify, fearing the im-

[12] Appellants also argue that the notice requirement in Fed.R.Evid. 804(b)(5) mandates rigid compliance, so that a trial court is precluded from admitting evidence that is not furnished to the opposing party before trial. Assuming *arguendo* that this is true, we find that the omitted lines were properly admitted pursuant to Fed.R.Evid. 803(3), which authorizes the admission of statements of the declarant's then existing state of mind.

peaching cross-examination that the defense obviously would have mounted. We conclude that the instruction given was not an abuse of discretion.

AFFIRMED.[13]

[13] Raymond Basha and Michael Monahan also challenge the sufficiency of the evidence to support their convictions. Their arguments are without merit and warrant no discussion. Likewise, Accetturo's contention that the district court erred by enhancing his sentence four levels for abduction, and two levels for his role as an organizer or leader, is without merit and warrants no discussion.

APPENDIX B

IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

No. 90-3681

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

ANTHONY ACCETTURO, ROBERT S. BASHA,
RAYMOND J. BASHA, MICHAEL V. MONAHAN,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: ANDERSON, Circuit Judge, HILL, Senior Judge, and YOUNG*, Senior District Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

*Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ R. LANIER ANDERSON, III
UNITED STATES CIRCUIT JUDGE

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
Sep. 25, 1992
Miguel J. Cortez
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

Case No. 89-284-CR-T-10A

UNITED STATES OF AMERICA,

v.

ANTHONY ACCETTURO, JR., A/K/A "TONY";
ROBERT S. BASHA; RAYMOND J. BASHA;
MICHAEL V. MONAHAN.

ORDER

Before the Court is the Government's motion to admit two statements of Chris James Loiselle under Fed.R.Evid. 804 (b)(5). The Defendants have responded that the statements are not admissible under Rule 804(b)(5), and their admission would violate the defendants' rights under the confrontation clause, on the ground that the statements lack sufficient indicia of reliability. The Court conducted a hearing on the Government's motion on April 2 and 3, 1990. Based on the evidence produced by the Government in support of its motion, the Court concludes that the statements are supported by sufficient indicia of reliability such that the requirements of Rule 804(b)(5) are met and their admission will not violate the confrontation clause.

Loiselle is named as the victim of the alleged extortion and kidnapping charged in the indictment and was going to be called as the principal witness for the Government in this case. However, Loiselle disappeared in the early morning hours of March 10, 1990, just two days before the trial was scheduled to commence. His body was subsequently found, and the

resulting investigation disclosed that he was murdered.[1] The Government seeks to admit a written statement given by Loiselle to the Largo Police Department and evidence of an oral statement made by Loiselle to Special Agent Ken Sands.

A. *Confrontation Clause*

"[U]nder certain circumstances a defendant's right to confront the witnesses against him must give way to allow the admission of incriminating evidence even though such evidence cannot be cross-examined." *United States* v. *Chapman*, 866 F.2d 1326, 1330 (11th Cir. 1989). Hearsay evidence may be admitted against a defendant upon a showing by the prosecutor that (1) "the declarant is unavailable to testify despite [the prosecution's] good faith efforts to obtain his presence at trial," and (2) "the out-of-court statements bear sufficient indicia of reliability to provide the jury with an adequate basis for evaluating their truth." *Id.*

1. *Loiselle's written statement*

The written statement to the Largo Police Department is four pages in length and gives an account of the activities underlying the offenses charged in this case. The substance of the statement is as follows: Loiselle was the general manager of the Miami branch of First Swiss International Securities Corporation. Because of financial difficulties, Loiselle borrowed money from some accounts to continue operating the office. Unable to return the funds to these accounts, Loiselle contacted Defendants Robert and Raymond Basha about a possible loan for this purpose.[2] The loan was made, but Loiselle was unable to enjoy it. Without contacting the Bashas, he moved to his mother's house in Tampa.

[1] *See* exhibits (newspaper articles) attached to defendants' motion for continuance and/or change of venue (doc. # 106).

[2] Loiselle was referred to the Bashas by a friend.

One night in late September (a Wednesday) about 2:30 a.m., Robert Basha and a person named "Mike" arrived at the house and directed Loiselle to accompany them in their car. Although Loiselle thought they were just going to drive in the neighborhood, they drove him to Hollywood, Florida. He was eventually taken to R & R Jet Tech, a jetski/watersport business owned by the Bashas. Robert and Raymond Basha told him he would have to speak to the person whose money he had borrowed. The statement then recites that:

> About 2:30 p.m. Wednesday this heavy set short (5' 7" guy) blue cap, large gold necklace, arrived. . . . The guy walked up to me and smashed me in the face with his hand and told me that if I didn't get ahold of the money he would put me in the ground. . . . (I think his name was Eddy) [H]e said . . . if he had to see me again he would 'put me in the ground and he would be the last person I saw again.'

It is undisputed that Loiselle is unavailable, thus the Court must determine whether the statement bears sufficient indicia of reliability. Four factors have been identified as significant with respect to reliability. The first factor is "whether the truth of the out-of-court statements is corroborated by other evidence." *See Chapman, supra.* The Government has shown that substantial circumstantial evidence corroborates Loiselle's statement. The Government has provided a copy of the loan agreement executed by Defendants Robert and Raymond Basha and Loiselle. The Agreement corroborates Loiselle's statements concerning the terms of the loan. The Agreement also corroborates Loiselle's statement that Robert and Raymond Basha are associated with R & R Jet Tech in Hollywood, Florida. The Government also has provided transcripts of phone conversations between Loiselle and Robert Basha. The transcript of a conversation which took place on the morning of October 18, 1989, also corroborates the exis-

tence of the loan agreement and the nature of its terms. The evidence of the terms of the loan is circumstantial evidence in support of Loiselle's statement that he was kidnapped and physically abused for not repaying the loan on time. Considering the terms of the loan,[3] and the unavailability of legal process to enforce it, threats of physical retribution would be the likely method employed to compel repayment.

The transcript also corroborates Loiselle's statement that he was struck in the face by the person whose money he had borrowed. The transcript provides in part as follows:

Loiselle:	"I want this behind me just as much as you do. . . . I didn't want to go through what I went through before."
Robert Basha:	"That was nothing . . . that was a slap in the wrist . . . that's nothing (chuckle) . . . I don't know what kind of concept you have of what's going on here or who . . ."
Loiselle:	"I know what he said . . . he's told me . . .
Basha:	". . . the guys that you're dealing with here. It's not no slap in the face that you got before."[4]

At the hearing on the Government's motion, the Government offered the testimony of FBI Agent Glen Edwards. Agent Edwards' investigation traced the steps of Loiselle on the night he was last seen prior to his disappearance. Based on his investigation, Agent Edwards testified that Loiselle

[3] According to the loan agreement, the amount of the loan was $40,000. The amount of the loan plus $20,000 in interest was due within forty-five days. Fifty percent of the total loan was due within thirty days, and a $1,000 penalty was to be added for every late day after forty days.

[4] Transcript of October 18, 1989 conversation at 2-3.

and a Kevin Copeland went to a bar called Tracks about 10:30 p.m. on the evening of March 9, and that he and Copeland left Trucks around 12:30 a.m.[5]Agent Edwards also testified that, on March 23, a witness at Tracks had positively identified the photos of Robert Peterson[6] and defendant Anthony Accetturo, Jr., as having been at the bar together approximately one month earlier. As this testimony is some evidence that Accetturo may have been involved in the murder of Loiselle, it is also circumstantial evidence of the reliability of Loiselle's written statement.

The Court also notes that Agent Edwards testified that a witness at Tracks stated that Accetturo was wearing a large gold necklace. Loiselle described his assailant as wearing a large gold necklace. Thus, this testimony corroborates Loiselle's description of the person who struck him in the face. Loiselle's statement that he was slapped in the face is also corroborated by Loiselle's oral statement to Special Agent Ken Sands that Accetturo was the person who "slapped" him.[7] The foregoing represents substantial corroborating evidence of Loiselle's written statement.[8]

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[5] It was common knowledge that Loiselle frequented the bar.

[6] Agent Edwards testified that Peterson is an associate of Accetturo.

[7] According to Agent Sands, Loiselle identified defendant Accetturo within a few se onds after Accetturo exited the plane. And in an excited manner, Loiselle said, "that's the man who slapped me, that's Tony." This oral statement is admissible as a statement of present sense impression under Fed.R.Evid. 803(1) and may, therefore, be considered as corroborative of Loiselle's written statement. Moreover, as shown below, the oral statement is also admissible under Rule 804(b)(5).

[8] One of the defendants' witnesses, Robert Brindley, testified that Loiselle told Brindley that Loiselle had gone with the defendants voluntarily. Brindley testified further that Loiselle stated that he was going to say that the defendants had kidnapped him so that he would not have to repay the loan. Another of the defendants' witnesses, Molesko, testified that Loiselle's statements concerning the financial problems with the Miami branch of First Swiss Corporation were inaccurate. Although this testimony contradicts Loiselle's statement, the Court concludes that this testimony does not significantly minimize the reliability of the statement in light of the substantial corroborating evidence provided by the Government.

The second factor is "the extent of the out-of-court declarant's personal knowledge of the defendant's identity and role in the crime." *Id.* Loiselle is the victim of the offenses alleged in the indictment, and the information in his statements is based on his first-hand interaction with the defendants. Thus, this factor supports the reliability of Loiselle's statement.

The third factor is "the possibility that the statements are founded on faulty recollection." *Id.* The written statement to the Largo Police Department was made only two days after the events allegedly occurred. Thus, there is no reason to believe that the statement could be based on faulty recollection.

The fourth factor is "the circumstances under which the statements were made." *Id.* The written statement was knowingly made to law enforcement officials. The fact that the statement was made to public officials who would begin an investigation to ascertain its truth lends some reliability to the statement. *See Chapman, supra* at 1331. Moreover, although the written statement does not specifically state that it was made under penalty of perjury, it does state that it was made under oath.

Additionally, the reliability of an isolated statement may also be colored by "compelling evidence of the lack of credibility of its source." *United States* v. *Fernandez*, 892 F.2d 976, 983 (11th Cir. 1990). At the hearing on the Government's motion, the defendants offered the testimony of witnesses who had been business associates of Loiselle. These witnesses testified that Loiselle had engaged in unethical and perhaps unlawful business practices and that he had made certain misrepresentations to them concerning their business dealings. Two of the witnesses also testified that he had a poor reputation for truthfulness. The Court concludes, however, that

this evidence of lack of credibility was not so compelling as to detract from the substantial corroborating evidence provided by the Government.

Based on the foregoing, particularly the substantial corroborating evidence provided by the Government, the Court concludes that Loiselle's written statement has sufficient indicia of reliability such that its admission will not violate the defendants' Sixth Amendment right to cross-examine the witnesses against them.

2. *Oral statement to Agent Sands*

At the hearing on the Government's motion, the Government offered the testimony of Special Agent Ken Sands. Agent Sands testified that he accompanied Loiselle to the St. Petersburg/Clearwater airport as part of the undercover phase of this investigation. He testified that when a person matching the description of Accetturo exited the plane, Loiselle identified the person as the man who "slapped" him and said, "that's Tony."

This statement is substantially corroborated by the transcript of the October 18 phone conversation with defendant Robert Basha. During the conversation, Basha identifies Accetturo as having "an interest" in the loan. Moreover, Accetturo's name arises in the context of a discussion of the threat that physical harm will be inflicted on persons who do not repay their loans.[9] The transcript provides in part:

Loiselle: "But, I want to get this done . . ."

Basha: "Yeah, believe me, I want to, too . . . these guys come by here, you know daily. . . ."

[9] *See* Transcript of October 18, 1989 conversation at 3-7.

Loiselle: "Is this . . . is this Tony or what's it . . .?"

Basha: "Tony and Bobby . . . both . . . took an interest in it." . . . "You can call down here, I could give you his last name . . . ."

Loiselle: "What's it, what's . . .?"

Basha: "Accetturo . . . Accetturo. . . ."

Loiselle: "I'm sitting up here coughing up blood because of my ulcer, . . ."

Basha: "That's nothin' . . . you could cough up blood, it's nothing. It's nothin' compared to what these guys could do. Believe me, believe me when I say that."

Loiselle had first-hand contact with Accetturo prior to identifying him at the airport, and this interaction forms the basis of some of the charges against the defendant. Significantly, Agent Sands testified that Loiselle was in an excited condition when he made the statement identifying Accetturo as his assailant. There is also no reason to believe that the statement could be founded on faulty recollection. And as the statement was made to a law enforcement official, Loiselle certainly knew that the truth of his statement would be investigated. Based on the foregoing, particularly the substantial corroborating evidence, the Court concludes that Loiselle's oral statement to Agent Sands may be admitted without violating the defendants' Sixth Amendment rights under the confrontation clause.

B. *Rule 804(b)(5)*

Rule 804(b)(5) provides, in pertinent part, that:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness [is not excluded by the hearsay rule] if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The defendants contend that the statements of Loiselle lack the equivalent circumstantial guarantees of trustworthiness required by Rule 804(b)(5).[10] Based on the foregoing discussion with respect to the defendants' confrontation clause rights, the Court concludes that Loiselle's statements have circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions under Rule 804(b).[11]

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[10] It is undisputed that Loiselle is unavailable and that his statements are material. During the hearing on the motion, Counsel for one of the defendants suggested that the statements were not more probative than any other evidence which the Government could reasonably procure. The Court concludes that Loiselle's statements are more probative on the points for which it is offered than any other evidence which the Government could reasonably procure.

[11] Loiselle's statement is admissible under Fed.R.Evid. 803(1) in any event. *See supra* note 6.

Upon due consideration, therefore, the Government's motion to admit the statements of Loiselle is GRANTED.

SO ORDERED, this 6th day of April, 1990.

s/ ANTHONY A. ALAIMO

ANTHONY A. ALAIMO, Judge
Southern District of Georgia,
Sitting by Designation